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United States: Class Actions

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The United States has a robust class action regime for antitrust litigation as part of a dual system of public and private enforcement. Antitrust class actions are typically brought by direct or indirect purchasers of companies in industries accused of widespread anticompetitive behaviour. These cases often, but do not always, follow investigations or enforcement actions by the US Department of Justice or Federal Trade Commission. Through a multi-district litigation procedure in federal court it is common for these cases to be consolidated in one court so a single judge presides for pretrial purposes, including class certification.¹

The class action is ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’² ‘In order to justify a departure from that rule, ‘a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.’³ More specifically, ‘a party seeking to maintain a class action must be prepared to show that [Federal] Rule [of Civil Procedure] 23(a)’s numerosity, commonality, typicality, and adequacy-of-representation requirements have been met and must satisfy through evidentiary proof at least one of Rule 23(b)’s provisions.’⁴ The Supreme Court has made clear that the class certification inquiry is not ‘a mere pleading standard’⁵ and ‘certification is proper only if “the trial court is satisfied, after a rigorous analysis, that [Rule 23’s] prerequisites ... have been satisfied.”’⁶ Such an analysis will frequently entail ‘overlap with the merits of the plaintiff’s underlying claim. That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.’⁷

Implications of class actions unique to antitrust cases

Several factors unique to the US private antitrust laws raise the stakes of a court’s class certification decision. Actual damages within a four year statute of limitations, which can be tolled in conspiracy cases alleging fraudulent concealment, are automatically trebled. In addition, co-conspirators are jointly and severally liable for total damage awards,⁸ with no right of contribution.⁹ Thus, any plaintiff can seek to recover the entirety of treble damages (minus any settlement amounts actually received from other defendants) from any single defendant. This dynamic creates considerable pressure on defendants to settle class actions regardless of the merits of the case.¹⁰

Satisfying the prerequisites of Rule 23(a)

A class representative must initially meet all requirements of Rule 23(a), which are designed to ensure ‘that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate.’¹¹

Numerosity

The Rule 23(a)(1) numerosity requirement frequently goes untested.¹² While courts have rejected classes where the number of class members is based solely on speculation, an exact count of class members is not required and approximations generally suffice.

Commonality and typicality

Rule 23(a)(2) requires that there be questions of law or fact common to the class. Not every question of law or fact must be common¹³ or dispositive.¹⁴ However, plaintiffs’ claims ‘must depend upon a common contention ... [that] must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.’¹⁵

Rule 23(a)(3) further requires that ‘the claims or defenses of the representative parties are typical of the claims or defenses of the class.’¹⁶ The typicality requirement does not require that named representatives have identical legal claims or theories as all absent class members. It does, however, generally preclude certification where the claims of the named representative or the defences they are subject to are unique.

Adequate representation

Finally, Rule 23(a)(4) requires that representative party (and their counsel) will adequately represent the interests of the class. The genesis of this requirement is the fact that, absent opting out of a class pursuant to Rule 23(c)(2), absent class members are bound by the final judgment achieved by the class representatives. One of the more common articulations of the standard under Rule 23(a)(4) requires that ‘the party’s attorney be qualified, experienced and generally able to conduct the proposed litigation’ and that ‘it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class.’¹⁷

Predominance under Rule 23(b)

In addition to the requirements of Rule 23(a), at least one of the three requirements listed in Rule 23(b) must be met. Antitrust class actions most often seek damages and are brought under Rule 23(b) (3),¹⁸ which requires that (1) questions of law or fact common to the class predominate over questions affecting only individual members, and (2) a class action is superior to other available methods for adjudicating the controversy.¹⁹ As recently described by the Supreme Court, the predominance inquiry

calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof. The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.

But the predominance requirement does not require ‘commonality as to all questions.’²¹ ‘When one or more of the central issues in the

action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members ...'

In antitrust cases, the predominance requirement often turns on the analysis of complex data by expert economists and whether or not there is common proof of injury to class members. For example, the Supreme Court rejected class certification where a damages model did not measure only those damages attributable to the allegedly anticompetitive conduct and thus 'cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).'²²

Ascertainability of class

In addition to the explicit requirements of Rule 23(a) and (b), most courts have concluded that there is 'an implicit requirement under Rule 23 that a class must be defined clearly and that membership be defined by objective criteria rather than by, for example, a class member's state of mind.'²³ What constitutes ascertainability has been extensively litigated, resulting in a circuit split currently unresolved by the Supreme Court.²⁴ However, a majority of courts also require that a plaintiff establish at the time of certification that 'there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'²⁵ The majority of courts have adopted this standard, which has most commonly arisen in consumer class actions seeking damages on low-priced consumer products for which class members have no objective proof of purchase. Beginning in the Third Circuit, the sole reliance on affidavits from customers, which are not subject to cross examination by defendants, to prove class membership has been rejected by the courts as failing this second prong of the ascertainability standard.²⁶ The Seventh and Sixth Circuits, however, have rejected this 'heightened' standard for ascertainability and have held that a class plaintiff is not required to demonstrate the 'administrative feasibility' of ascertaining a class at the time of certification.²⁷ District courts across other circuits, including most significantly the Ninth Circuit, remain divided.²⁸

Class action settlements

Rule 23 requires court approval for any settlement of a certified class, preceded by notice to class members in (b)(3) cases so they can opt out and preserve their claims and litigate separately if they choose to do so.²⁹ Trial courts are required to 'independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished.'³⁰

While federal courts clearly are required to conduct a Rule 23 analysis prior to certifying any class, in practice the relevant considerations contemplated in this analysis differ depending upon whether the class sought to be certified is a settlement class or a litigation class. While the requirements of Rules 23(a) and (b) generally must be satisfied to certify a settlement class, the Supreme Court has confirmed that when '[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems [under Rule 23(b)(3)(D)], for the proposal is that there be no trial.'³¹ However, the Supreme Court also admonished that 'other specifications of the Rule – those designed to protect absentees by blocking unwarranted or overbroad class definitions – demand undiluted, even heightened, attention in the settlement context.'³²

A seemingly incongruous result is that classes can be certified for settlement purposes even where they are found not to satisfy Rule 23's requirements for certification of a litigation class.³³

Appealing class certification orders under Rule 23(f)

There is no automatic right to immediately appeal a class certification ruling.³⁴ Given the significant impact of a class certification or denial, however, Rule 23(f) allows parties to request an immediate appeal, but defers to the appellate courts as to whether to grant this request or require that the parties await a final judgment and appeal as of right under 28 USC section 1291.

Under Rule 23(f), an appeal may be allowed 'on the basis of any consideration that the court of appeals finds persuasive.' 'Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.'³⁵ Most circuits also contemplate immediate judicial review in 'death-knell' situations for plaintiffs (where continuing as individuals is too costly) or defendants (where settlement pressure is insurmountable). In these death-knell situations, courts often require an additional showing that the district court's class ruling is 'questionable.'³⁶

Notes

- 1 28 U.S.C. section 1407. State attorneys general also can bring *parens patriae* actions on behalf of their residents for monetary recovery, which can continue in state court and avoid consolidation in federal court pursuant to the multidistrict litigation procedure. See *Mississippi ex rel. Hood v AU Optronics Corp.*, 134 S.Ct. 736 (2014).
- 2 *Comcast Corp v Behrend*, 133 S. Ct. 1426, 1432 (2013) (citation omitted).
- 3 *Wal-Mart Stores, Inc v Dukes*, 564 U.S. 338, 348-49 (2011) (citation omitted).
- 4 *Comcast*, 133 S. Ct. at 1428 (2013) (citation omitted). The plaintiff has the burden of proving that the requirements of Rule 23 are met. See, e.g., *Comcast*, 133 S. Ct. at 1432 (stating that a party must 'affirmatively demonstrate his compliance' with Rule 23); *Marcus v BMW of N. Am., LLC*, 687 F.3d 583, 591 (3d Cir. 2012) ('The party seeking certification bears the burden of establishing each element of Rule 23 by a preponderance of the evidence.');
- 5 *Wal-Mart*, 564 U.S. at 350, 131 S. Ct. at 2551.
- 6 *Comcast*, 133 S. Ct. at 1429.
- 7 *Id.*
- 8 *Perma Life Mufflers, Inc v Int'l Parts Corp.*, 392 U.S. 134, 144 (1968) (White, J, concurring) ('[D]amages normally may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends.');
- 9 *Tex. Indus., Inc v Radcliff Materials, Inc*, 451 U.S. 630 (1981).
- 10 *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2008) (citation omitted); see also *In re Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (a defendant does not need to be in risk of destitution for review of class certification; rather, class certification only needs to exert 'unwarranted pressure to settle nonmeritorious or marginal claims.')
- (citation omitted); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 7 (1st Cir. 2008) (interlocutory appeals of class certification appropriate where 'doubtful class certification results in financial exposure to defendants so great as to provide substantial incentives for defendants to settle non-meritorious cases in an effort to avoid both risk of liability and litigation expense.')
- (citation omitted).

- 11 Wal-Mart, 564 U.S. at 349 (citation omitted).
- 12 The number of class members required to satisfy the numerosity requirement, however, can be as low as a few dozen if the court deems joinder impracticable and considers as paramount the concepts of efficiency and judicial economy underlying Rule 23 – rather than requiring proof that joinder actually is impossible. See, e.g., *In re Nat'l Football League Players Concussion Injury Litig.*, No. 15-2206, 2016 WL 1552205, at *7 (3d Cir. Apr. 18, 2016), as amended (May 2, 2016) (class of 40 class members sufficient); *In re Marine Hose Antitrust Litig.*, 2009 U.S. Dist. LEXIS 71020, at *23-24 (S.D. Fla. 2009) (numerosity requirement satisfied by class between 50 and 66 geographically diverse members); *In re Beer Distrib. Antitrust Litig.*, 188 F.R.D. 557, 562 (N.D. Cal. 1999) (numerosity requirement satisfied by over 25 class members spread out among 50 states).
- 13 *Weiss v York Hosp.*, 745 F.2d 786, 808-09 (3d Cir. 1984) (although some questions raised might not be raised in respect to all class members, common questions of law and fact predominate to satisfy the commonality requirement).
- 14 *Davis v. Northside Realty Assoc.*, 95 F.R.D. 39, 43 (N.D. Ga. 1982) (Rule 23(a)(2) is satisfied '[i]f there is a common issue, irrespective of whether it is dispositive of the case').
- 15 Wal-Mart, 564 U.S. at 350.
- 16 Fed. R. Civ. P. 23(a)(3).
- 17 *Eisen v Carlisle and Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968).
- 18 Rule 23(b)(2) allows for certification where 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.' Fed. R. Civ. P. 23(b)(2). Antitrust class actions under Rule 23(b)(2) are not uncommon when only injunctive relief is sought, but certification under (b)(2) will be denied when the primary relief sought is monetary damages or those damages are not 'incidental to the injunctive or declaratory relief.' Wal-Mart, 564 U.S. at 360.
- 19 Fed. R. Civ. P. 23(b)(3). The superiority requirement often is not the focus of the Rule 23(b)(3) inquiry, but it can be in some cases, particularly where businesses are absent class members who otherwise may have individually pursued claims or can pursue individual claims.
- 20 *Tyson Foods, Inc v Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal quotations omitted).
- 21 Comcast, 133 S. Ct. at 1436.
- 22 Comcast, 133 S. Ct. at 1433. See also *Kleen Products, LLC, et al. v Int'l Paper Co., et al.*, Nos. 15-2385 & 15-2386, slip op. (7th Cir. Aug. 4, 2016) (affirming grant of class certification in alleged containerboard price-fixing case where defendants did not challenge the admissibility of the direct purchasers' economic experts and concluding that plaintiffs do not need to show injury to every class member at the class certification stage and stating that "the fact that class certification decisions must be supported by evidence does not mean that certification is possible only for a party who can demonstrate that it will win on the merits").
- 23 *Mullins v Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015).
- 24 The Supreme Court twice last Term declined certiorari to cases seeking resolution of this split. See, e.g., *Mullins v Direct Digital, LLC*, 799 F. 3d 497 (7th Cir. 2015); *Rikos v Procter & Gamble Co*, 799 F. 3d 497 (6th Cir. 2016).
- 25 *Hayes v Wal-Mart Stores, Inc*, 725 F.3d 349, 355 (3d Cir. 2013) (citation omitted).
- 26 See, e.g., *Byrd v Aaron's Inc*, 784 F.3d 154, 168 (3d Cir. 2015); *Karhu v Vital Pharmaceuticals, Inc*, 621 F.App'x. 945, 946 (11th Cir. 2015); *EQT Production Co v Adair*, 764 F.3d 347, 358 (4th Cir. 2014); *Carrera v Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013); *Xavier v Philip Morris USA Inc*, 787 F. Supp. 2d 1075, 1089-90 (N.D. Cal. 2011); *Weiner v Snapple Beverage Corp.*, No. 07 Civ. 8742 (DLC), 2010 WL 3119452, at *12-13 (S.D.N.Y. Aug. 5, 2010).
- 27 See, e.g., *Mullins*, 799 F. 3d 497; *Rikos v Procter & Gamble Co*, 799 F. 3d 497 (6th Cir. 2016).
- 28 The Ninth Circuit will hear an appeal in late 2016 from a district court denial of certification on ascertainability grounds in *Jones v ConAgra Foods, Inc*, Order Denying Motions for Class Certification, *Jones v ConAgra Foods, Inc*, No. 12-01633 (CRB), 2014 WL 2702726 (N.D. Cal. June 13, 2014).
- 29 The Class Action Fairness Act of 2005 also requires that specific regulators or government officials be notified of proposed class action settlements and provides for potential collateral consequences for non-compliance. 28 U.S.C. section 1715.
- 30 Id.
- 31 *Amchem Prods., Inc v Windsor*, 521 U.S. 591, 620.
- 32 Id.
- 33 See, e.g., *In re Am. Intern. Group, Inc Securities Litig.*, 689 F.3d 229, 241-43 (2d Cir. 2012) (holding settlement class alleging securities law violations not required to prove fraud-on-the-market presumption as required for class certification); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 306 (3d Cir. 2005) (explaining the court need not examine manageability issues for settlement-only class as it would be required to do for litigation class); *Thomas v Albright*, 139 F.3d 227, 234-35 (D.C. Cir. 1998) (noting that settlement-only class does not need to fulfill all requirements under rule 23(b)(3)(d)); *In re Processed Egg Products Antitrust Litig.*, No. 08-md-2002, slip op. at 11-15 (E.D. Pa. June 30, 2016) (granting certification of more expansive class for settlement purposes that the class certified for litigation purposes); *In re Dynamic Random Access Memory Antitrust Litig.*, No. 02-1486, 2013 U.S. Dist. LEXIS 188116, at *254 (N.D. Cal. Jan. 7, 2013) (holding that nothing in the court's prior ruling denying class certification as to a proposed litigation class prevented the court from subsequently granting certification for settlement purposes) (citing *Sullivan v DB Investments, Inc*, 667 F.3d 273, 306 (3d Cir. 2011)).
- 34 *Coopers & Lybrand v Livesay*, 437 U.S. 463, 470 (1978) (class certification rulings are 'inherently interlocutory').
- 35 Id.
- 36 *Blair v Equifax Check Servs., Inc*, 181 F.3d 832, 834-35 (7th Cir. 1999). See also *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99 (D.C. Cir. 2002) (interlocutory review appropriate 'when there is a death knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account the district court's discretion over class certification.');
- In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001) ('In line with our sister circuits, we hold that petitioners seeking leave to appeal pursuant to Rule 23(f) must demonstrate ... that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable...').



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Carrie C Mahan is a partner in Weil's Washington DC office, where she focuses on antitrust and consumer protection counseling and litigation. Ms Mahan has a diverse practice advising clients on antitrust and consumer protection issues in government investigations and private litigation, as well as mergers, acquisitions, and joint ventures. Her clients operate in a wide range of industries, from consumer products, chemicals, industrial products, and oil and gas, to financial products, medical devices and pharmaceuticals, retail, technology, and entertainment.

Ms Mahan has extensive experience representing clients in all of the major antitrust venues, including both state and federal courts and federal, state and international competition and consumer protection enforcement agencies. Her ability to develop unique arguments under complex antitrust theories has led her to play a leading role in the defence and overall strategy for many key clients, including large joint defence groups. She also provides general antitrust and consumer protection counselling, such as assisting clients in developing novel strategies for improving compliance programmes and mitigating risk.



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Adam C Hemlock is a partner in Weil's antitrust practice group and a member of the firm's management committee. He regularly represents clients in civil and criminal antitrust investigations and litigations, as well as commercial litigations and disputes.

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Mr Hochstadt has extensive experience with consumer and antitrust class action litigation, as well as antitrust lawsuits and commercial disputes between rivals or suppliers and distributors. He has litigated in state and federal courts around the country and participated in confidential arbitrations. He has litigated numerous dispositive and strategic motions, appeals, and has facilitated a number of favourable resolutions, including class action settlements, on behalf of litigation teams representing a wide variety of clients.

Mr Hochstadt regularly speaks and writes on numerous issues, including arbitration, antitrust, and class action developments. Also he currently is a lecturer in law at Columbia Law School teaching an advanced seminar on 'US civil and criminal enforcement of international cartels.'

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Weil's antitrust practice is one of the most diversified and well-respected competition practices in the world, with our partners being consistently recognised as leaders in the field for their significant knowledge and experience in handling high-profile matters. Many of our partners are former high-level government antitrust officials.

Our significant trial experience includes all types of civil and criminal cases before juries and judges in multiple jurisdictions, and expertise in appellate practice before national and international courts and tribunals. Our antitrust team also has substantial and successful experience in defending against class actions, representing clients and defending against virtually every kind of antitrust/competition or consumer protection allegation in a broad array of industries. Recent successful experiences include (i) defeating class certification against a massive proposed class of consumers that purchased eggs, as well as in a putative nationwide right of publicity class action regarding photographs of NCAA student athletes made available for sale on universities' athletic department websites; and (ii) obtaining significant monetary and long-term industry-wide conduct relief on behalf of a class of local television stations against a performance rights organisation.

Similarly, our antitrust M&A capabilities and track record are exceptional. Collaborating with lawyers in our M&A practice, we help clients structure transactions and business practices that minimise antitrust concerns. We routinely coordinate multi-jurisdictional filings to assure maximum chances for swift approval and protect our clients against the adverse effects of other companies' mergers through effective advocacy before various governmental agencies.



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